IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35740

WILLIAM LIGHTNER,	)	**2010 Unpublished Opinion No. 388**
	)	
Petitioner-Appellant,	)	**Filed: March 17, 2010**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Thomas F. Neville, District Judge.

Order summarily dismissing petition for post-conviction relief, affirmed.

William Lightner, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

William Lightner appeals from the summary dismissal of his petition for post-conviction relief. We affirm.

I.
BACKGROUND

In the underlying criminal case, William Lightner was convicted of lewd conduct with a minor under sixteen in violation of Idaho Code § 18-1508. Lightner filed a pro se petition for post-conviction relief in November 2007 collaterally attacking his 1994 conviction. Lightner's petition was based on the Idaho Supreme Court's decision in *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006). Lightner claimed ineffective assistance of counsel for failing to inform him of his right to refuse to participate in a psychosexual evaluation for purposes of sentencing. The state filed an answer in which it asserted that the statute of limitations precluded Lightner from bringing his claim. Lightner filed a response and claimed he was due relief because the circumstances of events in his case were similar in nature to those of *Estrada*, and his rights were

violated as such. Lightner then filed a motion to amend his petition stating the "foundation for filing the amended petition is that there were several issues of fact and law that the criminal court did not have an opportunity to rule on the merits that prior counsel failed to bring to the court's attention." Lightner also filed an amended petition raising additional claims and a supplemental amended petition for post-conviction relief.

On August 4, 2008, the district court entered a memorandum decision and notice of intent to dismiss, which notified Lightner of its intent to dismiss his petition as untimely and also that there was no basis for tolling because the rule announced in *Estrada* was "not a new rule which should retroactively be applied." The district court also denied Lightner's motion to amend because it was untimely and expressed concern that most of the pleadings filed by Lightner did not contain his actual signature. On August 25, 2008, the day the twenty-day notice period expired, Lightner filed a motion for a twenty-one-day enlargement of time to file a response stating the additional time was needed because the facility in which he was incarcerated did not have an adequate legal research library, and he needed more time to send information to his wife to get the issues researched and typed and have it returned to him to sign. The district court denied Lightner's motion and dismissed his petition. Lightner filed a motion for reconsideration, which the district court subsequently denied. Lightner now appeals.

II.

STANDARD OF REVIEW

An application for post-conviction relief initiates a civil, rather than criminal, proceeding, governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *see also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like the plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). "An application for post-conviction relief differs from a complaint in an ordinary civil action[.]" *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628)). The application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The application must be verified with respect to facts within

the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56. "A claim for post-conviction relief will be subject to summary dismissal . . . if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

On review of dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 220 P.3d 1066 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). However, "while the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted." *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069 (quoting *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985)); *see also Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). As the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, despite the possibility of conflicting inferences to be drawn

from the facts, for the court alone will be responsible for resolving the conflict between those inferences. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483; *Hayes*, 146 Idaho at 355, 195 P.3d at 714. That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id*.

III.

ANALYSIS

Lightner asserts that the district court erred in granting the state's motion for summary dismissal on the grounds that his petition was untimely. Specifically, he contends that the statute of limitations on filing a post-conviction petition should have been tolled in his case because a retroactive rule was announced in *Estrada*, and he filed his petition within one year of the issuance of that opinion. The state argues that Lightner is precluded by the statute of limitations from bringing a petition for post-conviction relief.

Idaho Code Section 19-4902 provides that "[a]n application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of a proceeding following an appeal, whichever is later." Absent a showing by the petitioner that the one-year limitation should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. *Evensiosky v. State*, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001); *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). Our review of the district court's construction and application of the time limitation aspects of the Uniform Post-Conviction Procedure Act is a matter of free review. *Martinez v. State*, 130 Idaho 530, 532, 944 P.2d 127, 129 (Ct. App. 1997).

In denying his petition for post-conviction relief, the district court decided there was no basis to toll the statute of limitations due to the fact that Lightner did not present any new evidence or any fact previously overlooked by the district court in its determination to dismiss the case. Recently, the Idaho Supreme Court stated, in *dicta*, that *Estrada* did not announce a new rule with retroactive effect. *Valvold v. State*, 148 Idaho 44, 218 P.3d 388 (2009). The court provided the following guidance:

> [W]e note, admittedly by way of dicta, that we agree with the district court's conclusion that *Estrada* did not announce a new rule of law. As the district court observed, we stated in *Estrada* that our earlier "*decisions clearly indicate* that both at the point of sentencing and earlier, for purposes of a psychological

> evaluation, a defendant's Fifth Amendment privilege against self-incrimination applies." 143 Idaho at 563, 149 P.3d at 838 (emphasis added). It is our view, therefore, that *Estrada* did not announce a new rule of law entitled to retroactive effect.

Id. at 46, 218 P.3d at 390. In addition, this Court recently determined from the "clear direction from our Supreme Court," that *Estrada* did not announce a new, retroactively applicable rule that would toll the UPCPA statute of limitations. *Kriebel v. State*, 148 Idaho 188, 191, 219 P.3d 1204, 1207 (Ct. App. 2009). Lightner has failed to present any genuine issue of material fact, and therefore has failed to show error in the dismissal of his untimely petition.

Lightner also asserts that he was denied access to the court when the district court applied the twenty-day notice requirement pursuant to I.C. § 19-4906(b) to his case, and denied his motion for a twenty-one-day extension of time to respond to the court's notice of intent to dismiss. To demonstrate the denial of meaningful access to the courts, an inmate must show that shortcomings in the prison legal program prevented his effort to pursue a claim. *State v. Ochieng*, 147 Idaho 621, 626, 213 P.3d 406, 411 (Ct. App. 2009). The Constitution requires only that inmates be given a reasonably adequate opportunity to present to the courts their nonfrivolous legal claims relating to their convictions, sentences, and conditions of confinement. *Id.*

Lightner first argues that the district court erred by "even applying a 20 day restriction on the Petitioner to begin with." He argues that he is incapable of filing documents within such a time frame because the law library is not adequate and he does not have a computer or typewriter, so he must rely on outside assistance from his wife. He argues that he often must violate time requirements because he has to handwrite documents, send them out to his wife, have her type the documents and mail them back to him, sign the documents and obtain a date to see a notary, and get the document back in the mail to reach the court. However, as the state points out, there is no rule that prevents Lightner from submitting handwritten documents to the courts. Lightner cannot claim that he was denied access to the court because he made the decision to file only typed documents.

Lightner further argues that by denying a request for an extension of time, the district court denied him access to the court. The decision to grant an extension of time is discretionary. *Payne*, 146 Idaho at 567-68, 199 P.3d at 142-43. Lightner requested the twenty-one-day extension the day his response to the court's notice of intent to dismiss was due. He requested

the extension for the same purpose as discussed above, that he did not have enough time to get everything typed, which the district court denied. The district court did not abuse its discretion in denying Lightner's request for an extension of time as it is not up to the court to make sure that the defendant has enough time to finish his chosen pleading preparation practices. Lightner also claims, for the first time on appeal, that the extension was necessary because prison officials held his response for twenty-four days before mailing it, thereby allowing it to arrive late. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992); *Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998). Lightner did not preserve this issue for appeal, so we decline to address it.

Next, Lightner asserts that the district court abused its discretion by denying him appointment of counsel. If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Id.* at 792, 102 P.3d at 1111; *Fox v. State*, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997). The district court abuses its discretion where it fails to determine whether an applicant for post-conviction relief is entitled to court-appointed counsel before denying the application on the merits. *See Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. In determining whether to appoint counsel pursuant to Section 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Id*. In its analysis, the district court should consider that applications filed by a pro se applicant may be conclusory and incomplete. *See id.* at 792-93, 102 P.3d at 1111-12. Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). However, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with

counsel and properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

The district court denied Lightner's motion for appointment of counsel. Even though Lightner's petition was time-barred, he asserted that the holding in *Estrada* should be retroactively applied to his case. However, in light of recent decisions by this Court and the Idaho Supreme Court it is clear that *Estrada* is not to be retroactively applied. Lightner has failed to raise the possibility of a valid claim. Therefore, Lightner's claim that the district court abused its discretion when it denied his request for counsel fails.

Lightner asserts that the district court erred in denying his motion to amend his petition. The district court denied Lightner's motion to amend because the proposed amended claims were also untimely. The court also addressed concerns about the authenticity of the pleadings filed in this case as the signatures on the documents were not Lightner's. However, it appears that Lightner does not challenge the district court's ruling that the proposed amended claims were untimely. Lightner only argues that the court abused its discretion in denying his motion to amend because the court did so on the basis that his wife was assisting him with his legal work. As the state notes, Lightner misunderstands the court's opinion. The district court did not deny the motion to amend because Lightner's wife was assisting him. Rather, it denied the motion to amend because the proposed additional claims were untimely and because it questioned the authenticity of the pleadings as it did not believe that Lightner had signed them. Because Lightner has failed to demonstrate error in the denial of his motion to amend, he is not entitled to relief on this basis.

Lightner next asserts that the district court erred when it held a hearing outside of his presence. He argues that he noticed a hearing was scheduled for August 26, 2008 of which he did not receive notice and at which he was not present. After reviewing the Register of Actions, there was an entry on August 4, 2008 that stated: "Hearing Scheduled (Status 8/26/2008 05:00 PM) (Review for Response by Petitioner)." This entry does not reflect the scheduling of an actual hearing, nor is there any indication in the Register of Actions that any such hearing occurred on August 26, 2008. This entry appears to be a reminder for the district court to review Lightner's case on that date in order to determine whether he filed a response. Lightner's assertion that the entry means anything else is unsupported by any actual evidence of a hearing on that date.

Finally, Lightner argues that the district court erred when it denied his motion to reconsider. However, Lightner has not provided an adequate record on appeal to review this claim. It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. *State v. Toney*, 130 Idaho 858, 860-61, 949 P.2d 1065, 1067-68 (Ct. App. 1997). In the absence of an adequate record on appeal, this Court will not presume error. *State v. Longoria*, 133 Idaho 819, 823, 992 P.2d 1219, 1223 (Ct. App. 1999); *Kugler v. Drown*, 119 Idaho 687, 690, 809 P.2d 1166, 1169 (Ct. App. 1991). Lightner did not include the court's order denying his motion to reconsider in the record on appeal, and has therefore failed to present an adequate appellate record to review this claim. Therefore, he has failed to establish that the district court erred.

IV.
CONCLUSION

The district court did not err in dismissing Lightner's petition for post-conviction relief as being untimely. Lightner was not entitled to have the statute of limitations tolled on the basis of his contention that *Estrada* announced a new, retroactively applicable rule. Moreover, Lightner's claims that he was denied access to the court, that the district court abused its discretion when it denied him appointment of counsel, that the district court erred when it denied his motion to amend his petition, that a hearing was held outside of his presence, and that the district court erred when it denied his motion to reconsider are all without merit. Accordingly, we affirm the district court's order dismissing Lightner's petition for post-conviction relief.

Judge GRATTON and Judge MELANSON **CONCUR.**